90-988

No. _____

In The

Supreme Court of the United States

October Term, 1990

NICHOLAS P. MANOCCHIO,

Petitioner,

v.

JOHN MORAN, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE STATE MAY PROVE AN ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE – THE CAUSE OF DEATH – BY INTRODUCING INTO EVIDENCE AN AUTOPSY REPORT CONTAINING DISPUTABLE CONCLUSIONS AND OPINIONS WITHOUT FIRST DEMONSTRATING THE UNAVAILABILITY OF THE REPORT'S AUTHOR?

II. WHETHER A WITNESS IS UNAVAILABLE WITHIN THE MEANING OF THE CONFRONTATION CLAUSE WHEN THE STATE KNEW IN ADVANCE OF THE WITNESS'S FOREIGN TRAVEL PLANS, DID NOT PLACE THE WITNESS UNDER SUBPOENA OR DEPOSE HIM, AND WHEN THE WITNESS AGREED TO RETURN VOLUNTARILY TO GIVE TESTIMONY?

III. WHETHER A MEDICAL EXAMINER'S DISPUTABLE CONCLUSIONS AND OPINIONS REGARDING A CAUSE OF DEATH BEAR SUCH INDICIA OF RELIABILITY WHEN STATED IN AN AUTOPSY REPORT THAT THEY MAY BE ADMITTED INTO EVIDENCE WITHOUT LIVE TESTIMONY FROM THE AUTHOR?

IV. WHETHER THE STATE MAY ESTABLISH "PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS" UNDER THE CONFRONTATION CLAUSE BY REFERENCE ONLY TO FACTORS RELEVANT TO THE CREDIBILITY OF THE MEDICAL EXAMINER, WHILE IGNORING THE FACTS RELEVANT TO THE RELIABILITY OF THE CONCLUSIONS AND OPINIONS EXPRESSED IN THE PARTICULAR AUTOPSY REPORT AT ISSUE.

QUESTIONS PRESENTED – Continued

V. WHETHER AN ACCUSED'S RIGHTS UNDER THE COMPULSORY PROCESS CLAUSE MAY SERVE AS A BASIS FOR FINDING THAT AN AUTOPSY REPORT CONTAINING DISPUTABLE OPINIONS AND CONCLUSIONS BEARS SUFFICIENT INDICIA OF RELIABILITY TO WARRANT ITS ADMISSION INTO EVIDENCE WITHOUT LIVE TESTIMONY FROM ITS AUTHOR?

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Nicholas P. Manocchio prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on September 24, 1990.

CITATION TO OPINION BELOW

The Opinion of the United Staes Court of Appeals for the First Circuit is reported as *Nicholas P. Manocchio v. John Moran*, ___ F.2d ___ (1st Cir. 1990) and is reproduced as Appendix A. The Opinion of the District Court for the Rhode Island is reported as *Manocchio v. Moran*, 708 F.Supp. 473 (D.R.I. 1989). The Opinion of the Supreme Court of Rhode Island is reported as *State v. Manocchio*, 497 A.2d 1 (R.I. 1985).

JURISDICTION

The decision and judgment of the United States Court of Appeals for the First Circuit were entered on September 24, 1990. A Petition for Rehearing and Suggestion for Reconsideration En Banc was denied on November 14, 1990. Order denying Petition reproduced as Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254, 1257, and 2254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case asks the fundamental question of whether the Confrontation Clause places limits on the prosecution's use of hearsay evaluative reports to establish an essential element of a criminal offense. The State of Rhode Island was permitted to prove the cause of death in its manslaughter case against Nicholas P. Manocchio by an unimpeachable official document – the autopsy report – without first making any effort whatsoever to

obtain live testimony from the pathologist who authored the report. The Confrontation Clause of the Sixth Amendment was aimed "the paradigmatic evil" of "trial by affidavit". *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring). The case below was tried by unsworn expert report.

The trial record developed over several days of hearing established that the State of Rhode Island made a conscious decision not to place under subpoena or to depose Dr. Joel N. Zirkin who performed the autopsy, although the prosecutor knew full well that Dr. Zirkin was intending to move to Israel. Out of the country at the time of trial, Dr. Zirkin nevertheless informed the prosecutor that he was fully willing to return to testify if the trial date could be postponed to avoid conflict with religious holidays. No request for postponement was ever filed.

Petitioner's objection to the use of documentary evidence in preference to live testimony was not an obstructionist effort to vindicate essentially abstract rights. The cause of death in this case was a legitimately disputable issue. The trial record established that the decedent, one Richard Fournier, had died from a sub-arachnoid hemorrhage sometime after being engaged in a parking lot brawl in Providence, Rhode Island. The autopsy report described a number of injuries, but the only serious head injuries were mandibular and maxillary fractures (a broken jaw). The report concluded that the decedent "died of multiple injuries, including mandibular and maxillary fractures, contusions and abrasions of the face, subgaleal hemorrhage and abrasions of the chest and extremities.", which in turn cause the sub-arachnoid hemorrhage.

Autopsy Report reproduced at First Circuit Appendix (Cir. App.) 054 *et seq.* Testifying before a grand jury, however, Dr. Zirkin significantly modified his report's conclusion. He stated under oath, and repeated in telephone conferences with defense counsel, that the most serious observed injuries, the jaw fractures, had nothing to do with the cause of death. Further, he conceded that the actual condition causing death, a sub-arachnoid hemorrhage, could have resulted from a variety of conditions, including aneurysms and the ingestion of cocaine and alcohol. According to Dr. Zirkin, the decedent had cocaine and alcohol in his system at the time he died. And certain of the report's most critical conclusions – that Richard Fournier was beaten by assailants in a parking lot on Mineral Spring Ave., North Providence, on November 2, 1980 at approximately 1:00 a.m." – came not from Dr. Zirkin's personal or medical knowledge at all, but from his reading of partisan police reports containing multiple hearsay.

Petitioner's jury, however, learned about none of these inconsistencies, inaccuracies, or alternative causations. Instead, after a several day voir dire hearing on the issue, the jury was simply handed an official certification that Richard Fournier died of multiple injuries received during a particular fight in a particular place at a particular date and time.

On appeal, the Supreme Court of Rhode Island found that the autopsy report was admissible under Rules 803 (6) and 803(8) and that the use of the document in preference to live testimony did not violate the Sixth Amendment because of circumstances of trustworthiness

inherent in the preparation of autopsy reports. *State v. Manocchio,* 497 A.2d 1, 7-8 (R.I. 1985).

Petitioner then filed a petition for writ of habeas corpus in the Federal Court for the District of Rhode Island. He alleged a violation of the confrontation right in that the medical examiner was legally available to the State and that the findings and conclusions contained in the autopsy report were disputable and did not bear sufficient indicia of reliability to be introduced as evidence in preference to live testimony. The District Court granted the petition, finding that the autopsy report was the sole evidence on the cause of death, that the State made no legitimate effort to obtain live testimony from the Medical Examiner, and that the autopsy report contained disputable medical opinions and multiple hearsay. *Manocchio v. Moran,* 708 F.Supp. 473 (D.R.I. 1989).

On the State's appeal, the First Circuit reversed. In a lengthy opinion, it reached a number of legal conclusions which will significantly affect the practice of criminal law in New England and which are squarely at odds with holdings from other Circuits.

First, the Circuit concluded that the State need not satisfy the two-pronged confrontation test enunciated in *Ohio v. Roberts,* 448 U.S. 56, 66 (1980) which required proof of both the unavailability of the declarant and the inherent reliability of the hearsay. Instead, it found that *United States v. Inadi,* 475 U.S. 387 (1986) "effectively limited the unavailability prong of the *Roberts* test to a narrow type of hearsay exception different from the present case." *Manocchio v. Moran,* ___ F.2d ___ (1st Cir. 1990), Opinion reproduced as Appendix A (App. A) to this Petition. This ruling goes far beyond the plain language

of *Inadi* and cannot be reconciled with holdings from other Circuits. *See e.g., Pickett v. Bowen*, 798 F.2d 1385 (11th Cir. 1986); *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984); *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984).

Second, while the Circuit recognized that autopsy reports as such do not fall within a firmly rooted exception to the hearsay rule, App. A 17, it found that "a determination of the cause of death following autopsy, is, in effect, a medical diagnosis", *id.* at 25, and that "records containing statements of medical opinions constitute a 'firmly rooted exception' to the hearsay rule, and thus would pass Confrontation Clause scrutiny." *Id.* at 25 (note omitted).

Precedent from other Circuits has concluded that documents recording routine observations, be they medical of otherwise, pose no confrontation problem. *See e.g., United State v. Miller*, 830 F.2d 1073 (9th Cir. 1987). But the same courts distinguish the situation where the prosecution seeks to introduce evaluative reports containing opinions and disputable conclusions. *E.g., Pickett v. Bowen, supra; United States v. McClintock, supra.* The First Circuit's decision here clearly conflicts with these well-established decisions.

Finally, the Panel Opinion takes the position that any problems with petitioner's Confrontation Clause opportunity were resolved by his ability to call the absent medical examiner as his own witness or by producing a defense expert. App. A 27-28. The Circuit cited as authority this Court's opinion in *Inadi*. But *Inadi* hardly supports such a transmogrification of constitutional jurisprudence. Instead, the discussion in *Inadi* regarding the availability

of compulsory process to the accused was set in the context of whether the prosecution would be required to establish unavailability of the witness before introducing the hearsay. Neither *Inadi*, or its predecessor *Dutton v. Evans, supra*, suggest that the availability of compulsory process could somehow bolster the *reliability* of the hearsay. Indeed any such conclusion makes no logical sense; and moreover would turn the Sixth Amendment into a multiple choice guarantee, where the prosecution in its discretion might give the accused confrontation rights or compulsory process rights, but not necessarily both.

Expert opinions and conclusions have always been grist for the confrontation mill. As long ago as 1865, this Court held that cross-examination is the time-honored vehicle for "separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection." *The Ottawa*, 70 U.S. (3 Wall.) 268, 271 (1865). One does not need the experience of cold fusion or the Challenger disaster to conclude that expert opinion has not progressed beyond the need for adversarial testing. Certainly the act of writing down expert opinion does nothing to enhance its reliability. It is both ironic and insupportable that the First Circuit should reach a legal result which would exclude from evidence Dr. Zirkin's sworn grand jury testimony under *Barber v. Page*, 390 U.S. 719 (1968), but which would accept the conclusions contained in his autopsy report – conclusions which their author had already admitted were open to dispute – because they somehow possessed such potent indicia of reliability to warrant their exemption from the crucible of cross-examination.

FACTUAL BACKGROUND

In the early morning hours of November 2, 1980, one Richard Fournier was brought to the Emergency Room of Roger Williams Hospital in Providence, Rhode Island. At 1:47 a.m., he died. The attending physician filed a report that the cause of death was "heart failure, to wit, blood loss, ... " *Transcript of the Trial* (Tr.) 1911. At approximately 11:00 a.m., an autopsy was performed by Dr. Joel N. Zirkin, Associate Medical Examiner for the State of Rhode Island. Following the autopsy, Dr. Zirkin began collecting further materials relevant to an assessment of the cause of death. At some point in time, probably in January of 1981, Dr. Zirkin authored an autopsy report which incorporated his original physical observations, lab and other reports from third parties, some but not all of the physical observations of a brain specialist, hearsay statements of civilian witnesses collected in a nine-page police report, and his own analysis. Autopsy Report reproduced at First Circuit Appendix (Cir. App.) 054 *et seq*. The conclusion of the autopsy report read as follows:

> It is our opinion that Richard Fournier, a twenty-four year old white male, died of multiple injuries, including mandibular and maxillary fractures, contusions and abrasions of the face, subgaleal hemorrhage and abrasions of the chest and extremities. Cerebral edema and sub-arachnoid hemorrhage resulted from the injuries although no cranial fractures, brain contusion, or subdural hemorrhage were seen. The decedent was beaten by assailants in a parking lot on Mineral Spring Avenue, North Providence, on November 2, 1980 at 1:47 a.m. Toxicologic studies show the presence of cocaine metabolite in the urine, marijuana metabolite and a small

amount of ethanol in the blood. The vitreous values are within normal limits.

MANNER OF DEATH: Homicide.

Cir. App. 057.

In January of 1981, Dr. Zirkin testified in a Providence County grand jury which was investigating the death of Richard Fournier. Dr. Zirkin reiterated his overall conclusion that the cause of death was multiple injuries resulting in a subarachnoid hemorrhage and that the manner of death was homicide. *Grand Jury Testimony of Joel N. Zirkin, M.D.*, reproduced at Cir. App. 063 *et seq.* However, he significantly contradicted the conclusions of the autopsy report when he stated that the most serious of the observed injuries, the fractures of the maxilla and mandible, had not affected the brain. Cir. App. 070. He further admitted that he found no fractures of the skull or any other major injuries to the head beyond these fractures of the lower face. Cir. App. 065-066; 070-071.

On January 30, 1981, petitioner Nicholas P. Manocchio, together with four defendants, was indicted by Ind. No. P/2 81-132 on charges of murder and conspiracy to murder. After receiving discovery which included Dr. Zirkin's report and his grand jury testimony, counsel for the petitioner interviewed Dr. Zirkin. In the course of this interview, Dr. Zirkin reaffirmed that the decedent's brain "was not affected by the fractures to the mandible and the maxillary bones, and that those fractures did not cause death. . . . " *Affidavit in Support of Motion in Limine* by Martin K. Leppo, Esq., originally filed in the trial court and reproduced at First Circuit Addendum (Cir. Add.) 16. Dr. Zirkin further conceded that sub-arachnoid hemorrhages could be spontaneous, caused by such phenomena

as berry aneurysms. Cir. Add. 16; Tr. 1912. And finally, they could be brought on "possibly by the injestion of cocaine, marijuana, alcohol or a combination of those. . . . " Tr. 1913 (counsel's representation of Dr. Zirkin's comments).

Based on this discussion, the defense recognized that the cause of death was a significant issue in the case. Counsel moved for production of all of the medical reports and studies performed on the decedent and which underlay the conclusions of the autopsy report. Motion to Produce reproduced at Cir. Add. 8. In particular the defense sought material relating to "the existence of cocaine metabolite in the urine. . . . " *Id.* The State did not produce these records until the time of trial, sparking defense claims of a serious discovery violation. Tr. 1992, 1966.

In the spring of 1982, the State became aware that Dr. Zirkin was planning to move to Israel. Tr. 1914. It never attempted to place him under subpoena. Tr. 1940. Instead, on July 20, 1982, the State filed a motion to take his deposition under Rule 15 of the Rhode Island Rules of Criminal Procedure. Motion reproduced at Cir. Add. 10. The prosecutor, however, never followed up this motion, apparently because the deposition would conflict with his vacation plans. When defense counsel urged that the deposition be taken as Dr. Zirkin was still in the country and still available, the prosecutor informed him that "he could bring Dr. Zirkin back from Israel if he chose to, depending upon whether or not he wished to expend the necessary funds, and that he would make that decision before the trial date of September 19, 1982; . . . . " Cir. Add. 17; *see also,* Tr. 1933. At trial, the prosecutor admitted that he was intending to bring Dr. Zirkin back, Tr.

1933, but the early September trial date conflicted with religious holidays. Tr. 1937. He further conceded that Dr. Zirkin was willing to return and could be available as a witness later in the year. Tr. 1937. The State, however, never filed the routine motion requesting a continuance. Tr. 1940. Instead, immediately prior to trial, the State filed a supplemental response to discovery outlining its intention to produce a different medical examiner to authenticate the autopsy report as a keeper of the records. *State Supplemental Response to Defendant's Motion for Discovery and Inspection Reproduced* at Cir. App. 076.

Trial commenced in Providence County Superior Court in September of 1982. The State produced a number of witnesses who identified one or more of the defendants as being in the night club at various times during the evening in question. No witness, however, was able to track all of the decedent's movements and activities over the entire evening. And only one witness saw any kind of a physical altercation. Her description of a fight in the parking lot was less than detailed, Tr. 17-18 *et seq.*, and her identification of the petitioner was open to serious impeachment.

On October 13, 14 and 15, 1982, the trial court heard argument and testimony on the defendant's Motion to Limine to preclude use of the autopsy report in the absence of testimony from its author. Initially, the trial justice required the State to decide whether it would utilize the substitute medical examiner, Dr. Arthur Burns, simply to authenticate the autopsy report or to try himself to testify regarding its conclusions. Tr. 1903-1094. The State made a tactical choice not to try to present Dr. Burns as a witness competent to render an opinion as to cause

of death, and instead offered only the autopsy report, authenticated by Dr. Burns as "keeper of the records". Tr. 1904. In the course of several days of arguments and testimony, the defense argued strenuously that the cause of death was a serious disputed issue where cross-examination of the author of the report was vital to any accurate assessment of how Mr. Fournier had died. *Eg.*, Tr. 1906; 1925-1926. The defense pointed out that there was a serious incongruity between Dr. Zirkin's grand jury admission that the facial fractures had not affected the brain and his conclusion that a sub-arachnoid hemorrhage had somehow resulted from the observed injuries. Tr. 1909-1910; 1924-1930. Counsel argued "that in order for there to be a subarachnoid hemorrhage, there should be some external evidence of a blow to the head; that the doctor, in his autopsy report in the grand jury testimony, finds a lack of any external injuries to that area." Tr. 1909. He pointed out that the first physician to examine the decedent gave as the cause of death, "heart failure, to wit, blood loss. . . . " Tr. 1911, which was completely different from the conclusion reached by Dr. Zirkin. And counsel stressed that Dr. Zirkin in pretrial conversations had conceded alternative theories of causation, Tr. 1912-1913, including the ingestion of cocaine which the autopsy report found in the decedent's system. Tr. 1913. Finally the defense argued that the autopsy report was not just a rendition of routine factual observations, but rather a conglomeration of observations, disputable medical conclusions, and reiteration of third party sources, both medical and lay. Tr. 1912-1913. In addition, the defense noted that the report had not been made contemporaneously

with the observations and hence was inadmissible as a business record. Tr. 1940-1941.

The trial court found the problem before it to be "an extremely serious issue. . . . " Tr. 1942, but after several sessions of argument ultimately denied the defendant's Motion in Limine to exclude the autopsy report made on both state law and federal constitutional grounds. Tr. 1942 *et seq.*; Tr. 2004.

The autopsy report was then admitted at trial through the alternative medical examiner, Dr. Burns. Tr. 2004 *et seq.* As the report was introduced as a full exhibit, the defense then attempted to cross-examine Dr. Burns regarding a number of Dr. Zirkin's findings and conclusions. Tr. 2017-2020. The court sustained the state's objections to all of these questions. *Id.* At the close of Dr. Burns' testimony, the defense again objected to the refusal of the Court to allow cross-examination of Dr. Burns and moved to strike both his testimony and the autopsy report. Tr. 2034; Tr. 2111 *et seq.*

The case went to the jury on murder and an assortment of lesser included charges. On October 22, 1982, the jury returned guilty verdicts of voluntary manslaughter and conspiracy to commit assault with a dangerous weapon against Nicholas Manocchio and two co-defendants. The jury was unable to reach a verdict on two other co-defendants, and a mistrial was declared as to them. On January 6, 1983, petitioner was sentenced to a term of imprisonment of fifteen years, twelve years to be served and three years suspended on the manslaughter

count. On the conspiracy to commit assault with a dangerous weapon, he was given a five-year sentence and five years probation.

ARGUMENT

I. THE FIRST CIRCUIT OPINION CONFLICTS WITH OTHER CIRCUITS ON THE IMPORTANT FEDERAL QUESTION OF WHETHER THE CONFRONTATION CLAUSE REQUIRES A STATE TO DEMONSTRATE THE UNAVAILABILITY OF THE AUTHOR OF AN EXPERT EVALUATIVE REPORT BEFORE INTRODUCING THE REPORT ITSELF INTO EVIDENCE.

In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), this Court articulated "a general approach" to the question of when statements admissible under an exception to the hearsay rule would also meet the requirements of the Confrontation Clause. This Court noted that the Sixth Amendment "operates in two separate ways to restrict the range of admissible hearsay." *Id.* First the Clause establishes a "rule of necessity", *id.*, requiring a showing that the declarant be unavailable before the statements are used in preference to live testimony. Second, if the declarant is shown to be unavailable, "his statement is admissible only if there is adequate 'indicia of reliability.' " *Id.* at 66. *Roberts* did not purport to establish a litmus test that would resolve the validity of all existing hearsay exceptions. *Id.* at 64-65. But this Court has continued to cite *Roberts* as delineating a viable general approach to a complex constitutional problem. *Eg., Idaho v. Wright*, ___ U.S. ___, 111 L.Ed.2d 638, 651-652 (1990).

Succeeding cases have applied the *Roberts* analysis to assess the constitutional legitimacy of varying kinds of hearsay. *Eg., Idaho v. Wright, supra* (statements of the juvenile witness to doctor); *Lee v. Illinois,* 476 U.S. 530 (1986) (confession of co-defendant); *United States v. Inadi,* 475 U.S. 387 (1986) (declaration of co-conspirator); *Bourjaily v. United States,* 483 U.S. 171 (1987) (declaration of co-conspirator). The only case however, to discuss the first prong of the *Roberts* standard – the unavailability of the declarant – was *Inadi* which found this requirement inapplicable to co-conspirator hearsay. Since *Inadi,* this Court has repeatedly identified the reach of the unavailability prong as an open issue. *Idaho v. Wright, supra* at 652; *Lee v. Illinois, supra* at 539.[1]

Federal and state courts are divided over the question of precisely when and under what circumstances a prosecutor must demonstrate the unavailability of a witness before introducing his/her hearsay. As one federal judge recently noted, "[t]he *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements." *Nelson v. Farrey,* 874 F.2d 1222, 1231 (7th Cir. 1989), *cert. denied,* ___ U.S. ___, 107 L.Ed.2d 831 (1990) (Flaum., J., concurring in case finding no confrontation clause violation in

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[1] In *Lee v. Illinois, supra* at 549 n.2, Justice Blackman, concurring with three members of the Court, assumed "for purposes of discussion, that in relevant aspects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi,* and thus that both *Roberts* requirements had to be satisfied."

introduction of out-of-court statements of juvenile sexual assault victim to doctor); *compare, Idaho v. Wright, supra* (later finding Sixth Amendment violation for hearsay reports to doctor). The First Circuit Court of Appeals in this case took the extreme position "that *Inadi* effectively limited the unavailability prong of the *Roberts* test to a narrow type of hearsay exception different from the present case." App. A 13. It therefore held that the District Court's finding that the State made no reasonable effort to secure the presence of Dr. Zirkin was wholly irrelevant to the issue of whether petitioner had been afforded his Sixth Amendment rights. *Id.* at 13.

The First Circuit cited no authority for this far-reaching conclusion. And for good reason: in comparable cases involving documentary evidence containing disputable conclusions, the weight of federal authority is clearly to the contrary. Thus in *Pickett v. Bowen*, 798 F.2d 1285 (11th Cir. 1986), the Eleventh Circuit held that where (as here) a "medical report was the only medical evidence introduced to establish a key element of the crime", and where cross-examination could be effective, the failure to produce the author of the report was constitutional error. Likewise in *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984), the Ninth Circuit reversed a conviction where reports evaluating gemstones were submitted to prove the actual value of the gems at issue. The Court ran through the *Roberts* unavailability analysis and concluded that because the evidence was "crucial" and because the means of evaluation required subjective decisions, the failure to afford cross-examination was prejudicial error. And in *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984), the Sixth Circuit condemned the use of a death

certificate to establish cause of death in preference to testimony from an available coroner where cross-examination would have established that the basis of an apparently medical conclusion was in fact lay reports. Indeed the only case cited by the Circuit in favor of its position, *Montgomery v. Fogg*, 479 F.Supp. 363 (S.D.N.Y. 1979), upheld the use of an evaluative report where there was no medical question whatsoever regarding the cause of death. *Id.* at 37. Finding that causation was "neither a 'crucial' nor a 'devastating' fact in the case", the District Court upheld use of the report while simultaneously observing that "[p]erhaps a different situation might exist in a case where there is a basis for a contention as to the cause of death". *Id.*

Inadi found that the unavailability of the declarant need not be shown as a predicate to the admission of co-conspirator hearsay for four separate reasons: first, statements made during the conspiracy have independent significance deriving from their context which would not be replicated in the trial setting; second, the status of declarant would be radically changed at trial, i.e., s/he would now be a defendant or a cooperating witness; third, the availability rule would be unlikely to achieve legally significant results for the defendant; and fourth, the burden on the prosecution would be significant. By contrast, none of these factors are particularly significant here. The opinions and conclusions expressed in an autopsy report gain no significance from their context which would not be equally present in the court room where their author could explain them to a lay jury. The status of Medical Examiner would remain constant between the time of the

drafting of the report and his trial testimony. Most significantly, an availability rule would significantly advance the truth seeking function of the confrontation clause. Entire chapters of standard legal treatises are devoted to the importance of cross-examining scientific experts. *E.g.*, Chapter III of Moenssens, *Scientific Evidence in Criminal Cases*, (3rd Ed. 1986); Imwinkelried, *The Methods of Attacking Scientific Evidence* (Va. 1982); Chapter 10 entitled "Impeachment of Expert Testimony" in 1 Wecht, *Forensic Sciences*, p. 10-5 et seq. (1987). To choose but one example, Professor Henry B. Rothblatt in *Forensic Sciences* observes that "an effective cross-examination of the medical expert is the cornerstone of a successful trial". *Id.* at 10-8.

Conversely, unlike the co-conspirator situation examined in *Inadi*, a prosecutor would have no legitimate reason to prefer a hearsay report to live testimony from an available medical examiner who by statute is responsible for "the presentation to the courts of Rhode Island of expert testimony relating to the cause of deaths; . . . . " R.I.G.L. 1956 (1985 Reenactment) Sec. 23-4-3(5). Indeed, the only reason to prefer the hearsay is tactical: to paper over ambiguities and inconsistencies which cross-examination might reveal. Far from advancing "the considerations of public policy and the necessities of the case," *Mattox v. United States*, 156 U.S. 237, 243 (1895), which sometimes cause the "preference for face-to-face confrontation at trial," to yield, *Ohio v. Roberts, supra* at 63, the rule applied by the Circuit only encourages tactical manipulation of the adversarial system.

Finally the burden on the prosecution to present live testimony is relatively minimal compared to the problem presented in *Inadi*. Medical examiners are ready (as

required by statute), willing (as evinced by Dr. Zirkin's willingness to return from Israel), and able (by their qualifications) to present live testimony. Until this case, they always did so. Indeed, the use of the autopsy report here was so unusual that the Deputy Chief Medical Examiner who authenticated the report as a keeper of the records stated that this was the very first time in his career that he had been asked to perform such a function. Tr. 1997.

In *Dutton v. Evans*, 400 U.S. 74, 89 (1970), a plurality of this Court observed "that the mission of the Confrontation Clause is to advance the practical concern for the accuracy of the truth-determining process in criminal trials. . . . " Here the truth determining process was ill-served by the introduction of a written report which asserted subjective opinions and conclusions, shorn of the ambiguities and inconsistencies which their author had already admitted under oath. For these reasons, the general approach enunciated by *Ohio v. Roberts* was both proper and necessary to insure that the fundamental purposes of the Confrontation Clause would be satisfied here.

II. THE FIRST CIRCUIT OPINION CONFLICTS WITH FEDERAL AND STATE DECISIONS ON THE IMPORTANT FEDERAL QUESTION OF WHETHER SUBJECTIVE OPINIONS AND CONCLUSIONS IN AN AUTOPSY REPORT BEAR SUFFICIENT INDICIA OF RELIABILITY TO BE ADMITTED INTO EVIDENCE WITHOUT LIVE TESTIMONY FROM THEIR AUTHOR.

The First Circuit agreed that precedent fell "short of establishing that autopsy reports, as such, are a firmly rooted hearsay exception." App. A 17. It went on, however, to divide the autopsy report at issue into its constituent parts – descriptive observations of the corpse, opinions and conclusions regarding the cause of death, statements as to the circumstances surrounding the death taken from the police reports and other lay sources, and the final conclusion as to the manner of death, *viz* "homicide".

As to the first category, the descriptive observations, petitioner did not challenge below and does not challenge here that the routine recordation of physical observations may be admissible in hearsay form as bearing substantial indicia of reliability. As for the latter two categories, the Circuit found their admission in hearsay form to be probable error, but harmless. Most importantly, the Circuit found that the scientific opinions and conclusions expressed in the report were in essence medical opinions which constitute "a firmly rooted exception" to the hearsay rule, App. A 25, that the report bore "particularized guarantees of trustworthiness" because it was prepared by a qualified physician in accordance with statutory requirements, *id.* at 17-18, and that any deficiency in petitioner's Confrontation Clause opportunity could be

made up by the exercise of his rights under the Compulsory Process Clause. *Id.* at 27-28. Each of these conclusions conflict with decisions from other Circuits and from the state courts. Further, they resolve important federal questions in a manner which significantly narrows the protection of the Confrontation Clause and which goes far beyond the jurisprudence of this Court.

A. The Expert Opinions and Conclusions

The First Circuit Opinion asserts that the determination of death in an autopsy report is "in effect a medical diagnosis prepared by the pathologist pursuant to law for important societal purposes.", *id.* at 25, and hence is comparable to a hospital record containing statements of medical opinion which is admissible under Rule 803(6) and which constitutes a " 'firmly rooted exception' to the hearsay rule, ... " *Id.* at 25. The Circuit cited no authority for this proposition except the case of *Phillips v. Neal,* 452 F.2d 337 (6th Cir. 1971) which reached a diametrically opposite conclusion. Instead the basis for this naked assertion was the Panel's further observation that medical conclusions "are based upon a common body of medical knowledge acquired by physicians who possess relevant medical qualifications." *Id.* at 26. In essence the Court took the position that doctors by definition are well trained experts who are presumptively correct in their judgments. This rosy view of the medical profession owes more to Marcus Welby than the real world.

As an historical proposition, neither Rhode Island common law nor the general history of the exceptions for

business or public records provide any basis for a conclusion that medical opinions and conclusions constitute a "firmly rooted exception to the hearsay rule". In *State v. McGregor*, 82 R.I. 437, 445-446, 111 A.2d 231 (1955), the Supreme Court of Rhode Island held that official medical records containing "matters of conclusion and expert opinion" would be inadmissible "without presenting for cross-examination the person who gave the opinion." *Cf., State v. Baron*, 65 R.I. 313, 317, 14 A.2d 795 (1940) (limitation on the cross examination of a medical examiner in a homicide case was prejudicial error).

Lacking any basis to admit this autopsy report under Rhode Island common law, the Supreme Court of Rhode Island took the extraordinary step of analyzing this case under the Federal Rules of Evidence which at that time had yet to be adopted in Rhode Island.[2] The Court found that an autopsy report could be admitted as a record of regularly conducted activity under Rule 806(6) or as a public record under Rule 803(8)(B). Neither of these two provisions, however, can provide the firm roots which would avoid the presumptive unreliability of hearsay evidence. *See, Lee v. Illinois, supra* at 543. Professor Weinstein notes that Rule 803(6) "has its primary roots in two distinct, common law doctrines, the shopbook rule and the regular entries rule, ... " 4 *Weinstein's Evidence*, para. 803(6)[01], p. 803-174 (1988). Both of these doctrines concerned only the recordation of factual matters and did not purport to justify admission of statements of opinion.

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[2] The Rhode Island Rules of Evidence were adopted on October 1, 1987. They track the federal rules with a number of minor exceptions not relevant here.

Id. 803-197. Indeed, prior to the adoption of the federal rules, many courts took the position that the " 'difference between a "fact" . . . and "opinion" is one of the fundamental differences in the law of evidence' ". *Id.* at 803-197, quoting *Lyles v. United States*, 254 F.2d 725, 731 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958). Weinstein notes that "[t]he admissibility of statements of opinion under the business records exception was especially troublesome in the area of medical records." *Id.* Most courts, therefore, "drew a distinction between diagnoses involving 'conjecture and opinion' and diagnoses upon which 'competent physicians would not differ' " *Id.* at 803-199, quoting *New York Life Insurance Co. v. Taylor*, 147 F.2d 297, 300 (D.C.Cir. 1945). In short Rule 803(6) did not simply codify preexisting common law, but rather it was necessary to resolve conflicts among the courts. *Id.* Thus the history of this hearsay exception stands in marked contrast to the co-conspirator statements analyzed in *Inadi, Bourjaily* and *Dutton*.

Regardless of the State court's technical categorization of the autopsy report as a business record under Rule 803(6) or a public record under Rule 803(8)(B), it is plain that the report bears all the earmarks of a public investigatory report containing expert opinion. Neither the common law nor the Federal Rules of Evidence to this day freely embrace the admissibility of such hearsay in criminal cases. Rule 803(8)(C) explicitly excludes "factual findings resulting from an investigation made pursuant to authority granted by law" when offered against the defendant in a criminal case. And, as the District Court noted in granting the habeas petition in this case, the question of whether conclusions and opinions in public

investigatory reports would be admissible *even in civil cases* has " 'divided the federal courts from the beginning.' " *Manocchio v. Moran*, 708 F.Supp. 473, 477 (D.R.I. 1989), quoting *Beech Aircraft Corp. v. Rainey*, ___ U.S. ___, 109 S.Ct. 439 (1988).

This Court once observed that there is no such thing as a false opinion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). The converse likewise obtains: there is no such thing as a true opinion. Instead opinions, particularly expert ones, may be more or less rooted in the data, more or less open to dispute, and more or less persuasive. For this reason, other Circuits and state courts have routinely held that where evaluative reports contain not merely routine factual recordation, but evaluative opinions and conclusions, the Confrontation Clause demands that the author of the report be subjected to cross-examination. *See, Picket v. Bowen*, 798 F.2d 1385 (11th Cir. 1986) (medical report finding evidence of sexual contact); *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984) (reports evaluating gemstones); *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984) (autopsy report); *United States v. Ordonez*, 737 F.2d 793 (9th Cir. 1984) (obscure drug ledger entries); *Moon v. State*, 478 A.2d 695 (Md.), *cert. denied*, 105 S.Ct. 1170 (1984) (disputable lab report showing alcohol test result); *Commonwealth v. McCloud*, 322 A.2d 653 (Pa. 1974) (autopsy report); *see gen'ly*, Imwinkelreid, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings, L.J. 621 (1978) (concluding that the introduction of such reports violates the Confrontation Clause).

In particular, forensic pathologists' opinions on the cause of death and autopsy reports are highly subjective.

See gen'ly., Devlin, *The Autopsy in Criminal Cases and Scientific and Expert Evidence*, p. 1205-17 (1981). As the Chief Medical Examiner for the State of Maryland has recognized, "[m]any findings at the autopsy or any medical history will be subject to two interpretations, one of which favors one side of the case and is presented by it; while the second favors the other, and is 'soft-pedaled'." Russell S. Fisher, M.D., *Determining the Cause of Death in Suspected Criminal Homicide Cases*, (1976).

The Circuit Court Opinion is thus in clear conflict with opinions from other Circuits and from the state courts.

B. Particularized Guaranties of Trustworthiness

The Circuit Court Opinion went on to find that the autopsy report at issue here had "particularized guarantees of trustworthiness" because it had been "properly authenticated at trial as having been prepared by a qualified physician under the auspices of the Medical Examiner's Office in accordance with statutory requirements in the established medical procedures of the Office."; and because there had "been no showing of a possible motivation on the part of the examiner to falsify the report; . . . . " App. A 18. These two factors, of course, are common to virtually all autopsy reports. They do not address, however, the fact that even the best-intentioned pathologist may reach a disputable, ill-founded, or even incorrect conclusion. Indeed, the Circuit's Opinion simply ignores the many questions about the autopsy report at issue here which its own author had raised in his grand

jury testimony and in his pretrial conferences with defense counsel.

The Circuit's approach conflicts with this Court's analysis in *Lee v. Illinois*, 476 U.S. 530 (1986) and *Idaho v. Wright*, ___ U.S. ___, 111 L.Ed 2d 638 (1990). In both these cases, this Court looked to the facts surrounding the particular hearsay statement at issue to decide whether it had such particularized guarantees of trustworthiness to justify its admission. By contrast, here the Circuit focused on the status and characteristics of the declarant to the total exclusion of the facts relevant to the statement itself. In essence the Circuit held that an evaluative report authored by a professional with no motive to lie will be admissible under the Confrontation Clause regardless of the reliability of its conclusions.

The trial record demonstrates that Dr. Zirkin himself made clear that his essential conclusions were open to question. In the grand jury, he testified, contrary to the plain language of the autopsy report, that the most serious of the observed injuries, the fractures of the maxilar and mandible bones, had not affected the brain. Cir. App. 070. In an interview with defense counsel, he reiterated and strengthened the conclusion that these fractures, the only serious observed injuries, did not cause death. Cir. Add. 16; Tr. 1913-1914. Further Dr. Zirkin admitted in this conference with defense counsel that there were alternative explanations for the death consistent with the observed facts. He conceded that sub-arachnoid hemorrhages could be spontaneous, and that they could be caused by a berry aneurysm. Tr. 1912; Cir. Add. 16. Indeed, such a brain hemorrhage could be brought on "possibly by the ingestion of cocaine, marijuana, alcohol,

or a combination of those." Tr. 1913 (counsel's representation of Dr. Zirkin's comments.) Here, of course, cocaine, marijuana, and alcohol were all found in the decedent's system.[3]

These inconsistencies and alternatives demonstrate that the autopsy report's conclusion of death due to multiple injuries did not bear such "particularized guaranties of trustworthiness" that it should be introduced without adversarial testing. To the contrary, as the Eleventh Circuit noted in *Pickett v. Bowen*, 798 F.2d 1385, 1387 (11th Cir. 1986), "[t]he utility to the defendant of the ability to examine at trial the doctor who had authored this report [was] readily apparent. . . . "

C. The Compulsory Process Clause

The First Circuit held that any deficiencies in petitioner's confrontation opportunity could have been remedied by an exercise of his rights under the Compulsory Clause to call either the author of the autopsy report as his own witness, or to put forward defense experts. App. A 27-28. In support of this position, the

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[3] This observation was corroborated by the Assistant Medical Examiner for the State of Connecticut, Dr. Ira Kanfer, who filed an affidavit in support of the habeas petition. After reviewing the autopsy report, Dr. Kanfer found that "the multiple injuries described in this report are not of a nature that would have necessarily caused the death of the decedent." Cir. Add. 19. Further he noted that "[s]ub-arachnoid hemorrhage may result from any of a variety of causes, including the ingestion of cocaine." *Id.*

Circuit cited this Court's opinion in *United States v. Inadi*, 475 U.S. 387 (1986).

In fact, neither *Inadi* nor its predecessor, *Dutton v. Evans*, 400 U.S. 74 (1970), suggest that the Compulsory Process Clause may somehow validate hearsay which otherwise could not be introduced under the Confrontation Clause. *Inadi* itself dealt with the first prong of the *Ohio v. Roberts* test: whether the Government had to demonstrate the unavailability of a co-conspirator before introducing his independently significant statement into evidence. It had nothing to do with the second aspect of *Roberts*, the statement's indicia of reliability. By contrast, here the Circuit sought to bolster the reliability of the autopsy report by suggesting that petitioner could have called Dr. Zirkin or Dr. Burns or some outside expert to give testimony in the defendant's case.

As a logical proposition, the reliability of a hearsay statement has nothing to do with the availability of compulsory process. The ability to call a witness does not make her/his prior hearsay statement more or less reliable. Rather, the question is whether one can substitute for the lack of the other. No precedent of this Court has ever suggested that a defendant is constitutionally entitled only to one out of two applicable provisions of the Bill of Rights. Yet that is the position taken by the Circuit.

Further, given the practical realities of this case, the Circuit Court's position was particularly inappropriate. Unlike *Inadi*, this case was not tried under the Federal Rules of Evidence which allow relatively free cross-examination of one's own witness. *Compare United States v. Inadi, supra* at 398 noting that under F.R.E. 806 respondent

would not have to have the declarant declared a hostile witness. Under Rhode Island common law applicable at the time of trial, if the defense had called either Dr. Zirkin or Dr. Burns, it would have been bound by his testimony and could not have cross-examined him unless defense counsel could fairly represent that s/he was surprised by the testimony. *E.g., State v. Quattrocchi,* 103 R.I. 115, 123, 235 A.2d 99 (1967). This procedural reality put the defense in an impossible position: it wanted the opportunity to cross-examine a key witness for the state; not to do the prosecutor's job by conducting direct examination of an adverse witness.

Further, insofar as calling independent experts was concerned, there were two major difficulties with this procedure. First, for all the reasons which the First Circuit noted in stressing the credibility of the Medical Examiner – his professionalism, his obligations under the statute, etc. – testimony from a hired private expert would be no substitute for concessions from the State's expert on cross-examination. Second, the record here demonstrates that the defense filed discovery seeking all the post-mortem medical reports and studies which underlay the conclusions of the autopsy report. *Motion to Produce* reproduced at Cir. Add. 8. The State, however, did not produce these records until the time of trial, sparking defense claims of a serious discovery violation. Tr. 1992, 1966. In these circumstances, as counsel argued to the trial court, presentation of a defense witness would have been effectively impossible. Tr. 1968.

Once the autopsy report was admitted over defendant's objection, the defense did take the one opportunity available to it: it sought to cross-examine the substitute

Medical Examiner who authenticated the autopsy report. The State, however, objected to all questions going beyond the facts relevant to the report's authentication. Tr. 2018-2020.

The First Circuit Opinion goes far beyond *Inadi*, *Dutton*, or other federal precedent in finding that the Compulsory Process Clause may serve to remedy the lack of confrontation in a case where the hearsay at issue contained disputable opinions and conclusions regarding an essential element of a criminal offense.

CONCLUSION

The decision of the First Circuit Court of Appeals conflicts with prior decisions from this Court, from the other federal circuits, and from state courts concerning issues which are critical to the continuing vitality of the Confrontation Clause. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 89-1310

NICHOLAS P. MANOCCHIO,

Petitioner, Appellee,

v.

JOHN MORAN, DIRECTOR,
DEPARTMENT OF CORRECTIONS,

Respondent, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Hon. Francis J. Boyle, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Brown,* *Senior Circuit Judge*,
and Breyer, *Circuit Judge*.

Annie Goldberg, Special Assistant Attorney General, with whom *James E. O'Neil*, Attorney General, was on brief for appellant.

John A. Macfadyen for appellee.

September 24, 1990

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*Of the Fifth Circuit, sitting by designation.

CAMPBELL, *Circuit Judge*. This appeal presents the question of whether, in a state criminal trial in which the accused is charged with murder and its lesser included offenses, the introduction into evidence of an autopsy report for the purpose of proving the cause of death, without the personal presence of the medical examiner who prepared and executed the report, violates the Confrontation Clause of the federal Constitution. Contrary to the district court, we hold that use of this report did not violate the Constitution.

The State of Rhode Island appeals from the judgment of the United States District Court for the District of Rhode Island granting the petition of Nicholas P. Manocchio for habeas corpus and overturning his state manslaughter conviction in the 1980 death of Richard Fournier. *Manocchio v. Moran*, 708 F. Supp. 473 (D.R.I. 1989). The district court ruled that the admission into evidence of an autopsy report in the absence of the medical examiner who performed the autopsy, Dr. Joel Zirkin, "in person or by deposition," *id.* at 479, deprived defendant of his Sixth Amendment right of confrontation and denied him "a full and fair trial on a crucial matter in the case." *Id.* Finding error "of constitutional dimension" that it could not regard as harmless, the court directed issuance of the writ under 28 U.S.C. § 2254(d)(2),[1] unless the

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[1] In granting the writ, the district court gave as its reason for failing to presume the correctness of determinations on factual issues made by the State court "that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U.S.C. § 2254(d)(2).

State of Rhode Island afforded defendant a new trial within 120 days. The district court granted the State's motion for a stay of judgment pending this appeal.

FACTS

The facts are fully set out in the opinion of the district court, *Manocchio v. Moran*, 708 F. Supp. 473 (D.R.I. 1989), and the Rhode Island Supreme Court, *State v. Manocchio*, 497 A.2d 1 (R.I. 1985). We repeat only those portions necessary to understand the reasoning of this opinion.

The challenged autopsy report was admitted into evidence over the objections of the petitioner that it violated his rights under the Confrontation Clause. The prosecution offered the report to establish that decedent's death was caused by multiple injuries, injuries otherwise shown to have been sustained during a beating at a parking lot. The autopsy was performed by Dr. Joel N. Zirkin, a forensic pathologist who was an Associate Chief Medical Examiner in the Office of the Medical Examiner for the State of Rhode Island, who had by the time of the trial separated himself from the office and removed permanently to Israel. Dr. Zirkin prepared and signed the autopsy report which was co-signed by two associates – Dr. Arthur C. Burns, Deputy Chief Medical Examiner, and William Q. Sturner, Chief Medical Examiner. The report incorporated information derived from various analyses performed by outside laboratories as well as an examination of the decedent's formalin-fixed brain performed by another specialist, Dr. Mary Ambler. Dr. Ambler reported upon the results of the formalin-fixed

brain examination at a conference attended by all three signatories to the report. The report also stated that the North Providence Police Department report and photographs, as well as the hospital emergency room records, were reviewed.[2] The report concluded as follows:

> CONCLUSION:
>
> It is our opinion that Richard Fournier, a 24 year old white male, died of multiple injuries, including mandibular and maxillary fractures, contusions and abrasions of the face, subgaleal hemorrhage and abrasions of the chest and extremities. Cerebral edema and subarachnoid hemorrhage resulted from the injuries although no cranial fractures, brain contusion, or subdural hemorrhage were seen. The decedent was beaten by assailants in a parking lot on Mineral Spring Avenue, North Providence, on November 2, 1980 at approximately 1:00 a.m. He was found with shallow respirations and a weak pulse. He was taken by Rescue to Roger Williams General Hospital where he died at 1:47 a.m.

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[2] The autopsy report summarized outside sources for the information contained in the report as follows:

> PROCEDURES AND SPECIMENS: The report and photographs of the North Providence Police Department are reviewed. The emergency room record of Roger Williams General Hospital is reviewed. Multiple x-rays and photographs are taken. Approximately, 20 cc. of antemortem blood, 60 cc. of postmortem blood, 40 cc. of urine and 5 cc. of vitreous are submitted for chemical and toxicologic studies. Bile and gastric content are saved. Fingerprints are obtained by the North Providence Police Department.

MANNER OF DEATH: Homicide[3]

Dr. Zirkin was not brought back from Israel to testify at the trial. He was not, moreover, deposed before departing for Israel, although the prosecution and the defense knew before he left that he was leaving the United States permanently. In place of Dr. Zirkin, the prosecution offered Dr. Burns, one of the other signatories to the report, indicating he would either (1) lay a proper foundation for admission of the autopsy, as keeper of the records for the Office of State Medical Examiners; or (2) testify as to the cause of death, being an expert qualified to speak to the substance of the report. The court required the prosecution to choose which of these two roles Dr. Burns would play. The prosecution elected the former and was thereafter required to limit its questioning of him to that role. Likewise, the defense was not allowed to cross-examine Dr. Burns as to the substance of Dr. Zirkin's conclusions, nor to qualify him as an expert during cross-examination. The court invited the defense to call Dr. Burns as its own witness if it wished to have him testify in relation to the substance of the report. The defense did not do so.

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[3] The relevant portions of the Rhode Island statute, R.I. Gen. Laws § 23-4-1 *et seq.* (1985), establishing the Office of State Medical Examiners are attached hereto as an Appendix. The statute provides for the appointment of a chief medical examiner and assistant medical examiners with authority to perform autopsies where they suspect that the manner of death could be homicide, suicide, casualty, infection or certain other causes. The Office of State Medical Examiners is responsible to maintain "a written determination of the causes of death" and "complete records" thereof.

I.

A. Analysis Under *Ohio v. Roberts*

The petitioner, as did the district court, relies heavily upon *Ohio v. Roberts*, 448 U.S. 56 (1980), in arguing that the Confrontation Clause of the Sixth Amendment was violated by the admission into evidence of the autopsy report without the presence and testimony of Dr. Zirkin, the medical examiner who performed the autopsy and prepared the report. At issue in *Ohio v. Roberts*, was the admissability [sic] of an absent witness's former testimony at a preliminary hearing. The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The *Roberts* Court noted, "If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. . . . But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." 448 U.S. at 63.[4]

In *Roberts*, the Court said the Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, it "establishes a rule of necessity" that in the usual case requires the prosecution either to produce, or demonstrate the unavailability of the declarant. And second, once the witness is shown to be unavailable, the Clause "countenances only hearsay

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[4] The Supreme Court has long recognized that certain forms of hearsay evidence may be received without violating the Confrontation Clause. *See, e.g., Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (admitting stenographic notes of prior testimony of a deceased witness).

marked with such trustworthiness that 'there is no material departure from the reason of the general rule'. . . . " *Id.*, 65. The Court summarized:

> In sum, when a hearsay declarant is not present. for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability."[5] Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote added).

The *Roberts* Court went on to note that a declarant becomes unavailable for confrontation purposes when the prosecutor has made a good faith effort to produce the declarant at trial, *Roberts*, 448 U.S. at 74 (citing *Barber v. Page*, 390 U.S. 719, 724-25 (1968)). Thus, under *Roberts*, admission of the autopsy report would conform to the Confrontation Clause only if the medical examiner who prepared it were shown to be unavailable and the report were found to bear adequate indicia of reliability. The Supreme Court of Rhode Island upheld express findings of the trial court both that Dr. Zirkin, the preparer of the report, was unavailable because he "was residing in Israel and was no longer connected with the Office of the Medical Examiner," *State v. Manocchio*, 497 A.2d 1, 5 (R.I.

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[5] This phrase originated in *Dutton v. Evans*, 400 U.S. 74, 89 (1970) and has been quoted numerous times subsequently.

1985), and that "the 'underlying trustworthiness' surrounding the generation of the autopsy report justified its admission." *Id.* at 8.

The district court disagreed. It found that the state had not made a good faith effort to obtain Dr. Zirkin's testimony. He could easily have been deposed before he departed for Israel, said the court, or he could have been brought back from Israel to testify at the trial. The district court did not focus on the reliability, as such, of the autopsy report. However, it gave as a further ground for rejecting it the fact that it contained not only medical opinions but also a "factual conclusion," *id.* at 478, (specifically, that decedent was beaten by unspecified assailants in a certain parking lot shortly before his death, information that the examiner had presumably obtained from the police report), as well as the examiner's conclusion that the manner of death was homicide. The district court stated,

> Since petitioner was found guilty of manslaughter and since the only evidence of the *corpus delicti* [here, that the beating caused the death] was the opinion of an absent Medical Examiner, the conclusion is inescapable that the jury acted on the information and conclusions stated in the Medical Examiner's Report. This is error of constitutional dimension.

708 F. Supp. 473, 478.

While the Rhode Island Supreme Court and the district court joined issue on whether Dr. Zirkin was available, we do not find it necessary to resolve that question. Recent Supreme Court precedent indicates that, while reliability continues to be a key factor in Confrontation

Clause analysis of hearsay, the declarant's availability, in a case like the present, is not. We explain why this is so.

B. The Roberts Test as Modified by Inadi: Unavailability Is Not a Constitutional Prerequisite

In *United States v. Inadi*, 475 U.S. 387 (1986), the Court declared that "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." *Id.* at 394. It held that co-conspirator statements of a non-testifying declarant could be admitted without a showing of unavailability. We believe that *Inadi* is controlling here.

The Court limited *Roberts* to its own specific situation of former testimony, explaining that unavailability was relevant in that context because former testimony seldom had independent value of its own, being simply an inferior substitute for present, live testimony. There is, therefore, little justification for relying on former testimony if the declarant is available to testify in person. When two versions of the same evidence are available, the Court said, confrontation principles "*favor the better evidence*," *Inadi*, 475 U.S. at 394 (emphasis added). But while live testimony is better than former testimony, it is not necessarily better than the type of co-conspirator hearsay at issue in *Inadi*. Being made while the conspiracy was in progress, such statements would provide evidence of the conspiracy's context that could not be replicated, even if the declarant testified to the same matters in court. *Id.* at 394-95. Such statements are "made

in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 396.

The reasoning in *Inadi* applies equally well to distinguish the former testimony of *Roberts* from most of the other hearsay exceptions, such as – for example – business records or public records. *See* Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 561 (1988) (*Inadi* supports the general proposition that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant). While an autopsy report, strictly speaking, does not fall within the category of a clearly recognized hearsay exception, *infra*, it shares most of the features of both the business records and the public records exceptions, see Fed. R. Evid., 803(6) and (8); and the reasoning of *Inadi* similarly applies. As one commentator puts it,

> Former testimony is exempted from the general prohibition on hearsay because it incorporates cross-examination and can, therefore, be evaluated nearly as well by the trier of fact as can in-court testimony. Other hearsay is exempted, however, [from the presence-if-available requirement] because the circumstances in which it was uttered make that class of hearsay more reliable than hearsay generally. The evidentiary value of all the other admitted hearsay depends on the context in which it was made. Just as in-court testimony is not a replacement for coconspirator statements, neither is it a replacement for any admissible hearsay, except for former testimony.

Jonakait, at 562 (footnotes omitted).

In the case of a business record, the context in which the hearsay was made (a record entered in the routine course of "business," broadly defined), may cause the jury to consider the record to be of greater value than the in-court testimony. *Id.* at 562-63. Thus, "if the jury accepts . . . that such documents have 'unusual reliability,' [citation omitted] the in-court testimony will not be a mere substitution for the hearsay." *Id.* at 563 n.28.

Like reasoning applies to autopsy reports, assuming they are otherwise admissible. If any length of time has passed since the performance of the autopsy, the medical examiner will probably not remember the autopsy and its results independently from the report itself. His detailed descriptions of the condition of the body, and often his judgments will be superior at the time he writes the report to any he could make later; he will ordinarily be able to testify only by reference to the report. Further, the routine, standardized conditions under which such reports are prepared, as well as the fact that the medical examiner is exercising a special responsibility which the law assigns to him, assure their independent reliability.[6]

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[6] An illustrative example is *Montgomery v. Fogg*, 479 F. Supp. 363 (S.D.N.Y. 1979), a case in which the district court denied habeas corpus relief which had been sought in part on the basis that admission of an autopsy report at trial without testimony by those who performed the autopsy impinged upon the right of confrontation. Judge Weinfeld found such reports to be official records with sufficient "indicia of reliability" to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)) *Id.* at 370. The court explained:

(Continued on following page)

To be sure, the introduction of an autopsy report in tandem with live testimony by its preparer might be the optimum course, but in *Inadi* the Court did not require such an ideal course, but rather permitted admission of the hearsay by itself where its independent reliability warranted. The Court, in *Inadi*, pointed out that an unavailability rule would not offer any significant benefits. The only time such a rule would act to exclude evidence is when "the prosecution makes the mistake of not producing an otherwise available witness," *id.* at 396, since the evidence could come in anyway whenever unavailability was demonstrated. If an available declarant were important to the defense, the defendant could employ his rights under the Sixth Amendment Compulsory Process Clause to force the declarant to attend

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(Continued from previous page)

> The autopsy reports in the instant case are official records kept in the regular and usual course of the performance by the medical examiner of his official duties. Their reliability is underscored by the rigid requirements of the New York statute that the examiner who performs the autopsy be a "doctor of medicine and a skilled pathologist and microscopist," and that he record and specify in detail his findings. [N.Y. County Law §§ 670-78 (McKinney's 1972)] They meet every indicia of reliability and thus afford a fact-finder a basis for evaluating the information. Indeed, if business records are admissible as an exception to the hearsay rule because they have the "earmarks of reliability" or "probability of trustworthiness" (citing *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943)) then, a fortiori, public records kept pursuant to statute carry greater weight of reliability.

Id. at 370-71.

the trial and testify. Very little could be gained by a rule requiring the prosecution to present an available declarant where the defendant chose not to summons the declarant. *Id.* at 396-98. Still another reason given by the *Inadi* court was to avoid the additional burdens on prosecutors and on the courts that would result from an unavailability rule.[7] *Id.* at 398-400. This reasoning would apply here equally.

We conclude that *Inadi* effectively limited the unavailability prong of the *Roberts* test to a narrow type of hearsay exception different from the present case. We are left, therefore, with reliability as the determining factor for the admissibility of the autopsy report under the Confrontation Clause.[8]

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[7] For example, "[a] rule that required each invocation of [the coconspirator hearsay exception] to be accompanied by a decision on the declarant's availability would impose a substantial burden on the entire criminal justice system." *Id.* at 399. Further,

> [f]or unincarcerated declarants the unavailability rule would require that during the sometimes lengthy period before trial the Government must endeavor to be aware of the whereabouts of the declarant or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith." [citations omitted].

Id.

[8] In *Lee v. Illinois*, 476 U.S. 530 (1986), decided after *Inadi*, the Court found that it did not need to address the question of the availability of the codefendant [sic] whose confession had

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C. Reliability of the Autopsy Report

Reliability may be demonstrated in one of two ways: by showing that the evidence falls within a firmly rooted hearsay exception[9] or by showing that the evidence possesses particularized guarantees of trustworthiness,[10]

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been introduced against the defendant, because the confessional did not bear sufficient independent "indicia of reliability" to overcome the presumption of unreliability that attends such accomplice confessions. This statement does not cut one way or the other on the current significance of availability as a necessary criterion.

[9] In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that co-conspirator statements could be constitutionally admitted against a defendant for the reason that they fell within a firmly rooted hearsay exception and could thus be considered reliable even without an independent inquiry into their specific reliability:

> We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements. . . . Accordingly, we hold that the confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of [the co-conspirator hearsay exception].

483 U.S. at 183 (footnote omitted).

[10] Admissibility of hearsay evidence under an exception to the hearsay rule of either the common law of evidence of a state or the Federal Rules of Evidence is not an absolute prerequisite to its admissibility under the Constitution. The Supreme Court, in *Lee v. Illinois*, held that hearsay not falling within a firmly rooted exception is "presumptively unreliable

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Ohio v. Roberts, 448 U.S. at 66. The first question becomes, thus, whether autopsy reports fall within a firmly rooted hearsay exception. In favor of that proposition is the fact that autopsy reports, like hospital records, fit conceptually within the long-established exception for business records. *See* Fed. R. Evid. 803(6), admitting, *inter alia*, medical reports and "diagnoses." Autopsy reports, however, may also contain information going beyond purely medical evaluations. The examiner may not only state the *medical* conditions causing death but may give his opinion as to whether death was caused by homicide, suicide, casualty, or other outside cause. *See* R.I. Gen. Laws § 23-4-4. The latter may involve hearsay contained in police investigations. *Compare* Fed. R. Evid. 803(8) (excluding public records of "matters observed by police officers and other law enforcement personnel"). The literature, moreover, does not indicate that autopsy reports are widely acknowledged as coming within a clearly established exception.

The Rhode Island Supreme Court declared in this case that autopsy reports qualify as admissible hearsay exceptions under Rhode Island evidence law. *State v. Manocchio*, 497 A.2d at 6. Although the Federal Rules of Evidence had not yet been adopted in Rhode Island at the time of this case, the Rhode Island Supreme Court had

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and inadmissible for Confrontation Clause purposes, [but] may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' " 476 U.S. 530, 543 (1986) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

specifically adopted Rule 803(6) (records of regularly conducted activity) – the business records exception – in an earlier decision, and it held that autopsy reports fell within that exception. *Id.* It also stated that autopsy reports would be admissible under Rule 803(8)(B)[11] – the public records exception – as well, had the Federal Rules of Evidence been adopted in Rhode Island. *Id.*[12]

Petitioner argues that the autopsy report should be specifically excluded here as produced by "police officers and other law enforcement personnel." We believe the Rhode Island Supreme Court was correct in rejecting this argument, finding

> a medical examiner, although often called a forensic expert, bears more similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.

State v. Manocchio, 497 A.2d at 7. *See also United States v. Hansen*, 583 F.2d 325, 333 (7th Cir.), *cert denied*, 439 U.S. 912; *but cf. United States v. Oates*, 560 F.2d 45, 68 (2d Cir. 1977). To the extent the report, in addition to medical

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[11] Rule 803(8)(B) allows in "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel*" (emphasis added). *See also* (8)(C) of Rule 803, indicating that, under the public records exception, governmental investigative findings are not admissible against a criminal defendant.

[12] Rhode Island has since adopted the Federal Rules.

observations, incorporates inadmissible matters based on police reports, these can be redacted. *Infra.*

Other courts have also rejected challenges under the Confrontation Clause to the admissibility of autopsy reports where the medical examiner was not produced. *See Montgomery v. Fogg,* 479 F. Supp. at 370-71 (allowing autopsy report despite absent medical examiner where there was no bona fide contention as to cause of death); *Connecticut v. Damon,* ___ A.2d ___, 214 Conn. 146, 157-59 (1990) (autopsy report admissible as business record of objective facts and observations, regardless of pathologist's availability, who was vacationing in India during the trial); *Collins v. State,* 369 N.E.2d 422 (Ind. 1977) (admission of autopsy report as public record did not violate Confrontation Clause despite absence of preparer). But these cases fall short of establishing that autopsy reports, as such, are a firmly rooted hearsay exception. Because such reports may contain the examiner's views as to such matters as whether death was caused by homicide and may incorporate information from outside the medical examiner's office, problems are raised going beyond a simple application of the mentioned exceptions. We turn, therefore, to the second question, whether they possess "particularized guarantees of trustworthiness."

For reasons discussed in the following section, we hold that the autopsy report presented in this case possessed sufficient "particularized guarantees of trustworthiness" that its admission in the absence of live testimony by its preparer did not offend the Confrontation Clause. We emphasize the following factors: (1) The report was properly authenticated at the trial as having

been prepared by a qualified physician under the auspices of the Medical Examiner's Office in accordance with the statutory requirements and the established medical procedures of the Office; (2) There has been no showing of a possible motivation on the part of the examiner to falsify the report; (3) The report's inclusion and incorporation of double hearsay from a non-medical, non-laboratory police report was, at worst, harmless error beyond a reasonable doubt because the accuracy of the included information was not in issue; (4) Similarly, the report's conclusion of "homicide," in these circumstances, amounted to no more than a restatement of the examiner's medical conclusion that death resulted from the multiple injuries observed on the decedent's body.

D. 'Particularized Guarantees of Trustworthiness' of Autopsy Reports

Petitioner argues that autopsy reports such as the one under consideration lack particularized guarantees of trustworthiness because, although they may contain elements that are in the nature of routine records – which have been recognized as possessing adequate indicia of reliability because they are a firmly rooted hearsay exception – they also contain such elements as factual conclusions and subjective expert opinions: "The autopsy report here was an unstable conglomeration of observed physical facts, hearsay reiterations of third party observations, including double hearsay reports from civilian witnesses, medical conclusions, and conclusions about the ultimate facts of the case." Brief for petitioner, at 20.

To deal with this argument, we examine separately the categories of statements included in the autopsy report as follows: (1) descriptive observations of the condition of the corpse, (2) medical opinions as to the nature of any injuries or illnesses as well as conclusions as to the medical cause of death based upon these opinions, (3) statements as to circumstances surrounding the death taken from police reports or other sources, and (4) the medical examiner's final conclusion as to "manner of death," *viz.*, "homicide."

1. Category-One Statements: Descriptive Observations as to the Condition of the Decedent's Corpse

Statements in the autopsy report falling into this category[13] are reliable for all of the reasons that routine business records or public records are deemed reliable. Like the information contained in business records, the reliability of the descriptive observation portion of autopsy reports prepared by state or county medical examiners' offices is enhanced by the routine and repetitive circumstances under which such reports are made. And since the reports are made at the time of the autopsy, their reliability is far greater than a later-recollected

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[13] An example of such descriptive observations taken from the autopsy report in this case follows:

> A faint, irregularly shaped, purple contusion measuring 2 1/2 by 1 1/2 inches is present on the left side of the forehead. Two abrasions are present on the right side of the forehead.

description by the preparer of the record.[14] Like information contained in public records, reliability is further enhanced by the existence of statutorily regularized procedures and established medical standards according to which autopsies must be performed and reports prepared, and by the fact that autopsies are carried out in a laboratory environment by trained individuals with specialized qualifications. *See* R.I. Gen. Laws § 23-4-1 *et seq.* (1985) set forth in Appendix.

Dr. Burns, the Deputy Chief Medical Examiner, who testified at the trial, authenticated the report and established that it was prepared under the auspices of the Medical Examiner's Office in accordance with the statute and the established medical procedures of the Office. He described the statutory mandate of the Office of the Medical Examiner, the way in which this mandate is carried out, and the generalized procedures of the Office regarding conduct of autopsies and preparation of the reports.

It happened in this case that Dr. Burns also had personal familiarity with this autopsy, qualifying him to testify to more than just the general procedures for conducting autopsies and preparing autopsy reports.[15] He

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[14] In the present case, even if Dr. Zirkin had been called as a live witness, he would most likely have been forced to base his testimony upon his own written autopsy report because of the large numbers of autopsies that medical examiners perform and because of the length of time that passed between the time of performing the autopsy and the time of trial. In Dr. Zirkin's earlier testimony before the Grand Jury in the same case, he stated, "If I may refer to my notes," and took his answers thereafter directly from the report.

[15] Personal familiarity with the autopsy report in question, however, is not a prerequisite to being qualified to authenticate

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had taken part in a conference held by the medical examiners with Dr. Mary Ambler, who did the examination of the formalin fixed brain which formed the core of the report; and he had signed the report even though he did not personally perform the autopsy.

The objectivity and impartiality of Dr. Zirkin and those associated with him, and of their methods in performing the autopsy and detailing their observations, are not in issue.[16] There is no reason not to believe that Dr.

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the report by showing that it was prepared under the auspices of the Office of the Medical Examiner according to established medical procedures and the statutory mandate.

[16] In the Federal Rules of Evidence, both the business and public records exceptions provide for rejection of the evidence where "the source of information or the method or circumstances of preparation" indicate lack of trustworthiness. *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984), serves to illustrate how an autopsy report lacking in proper authentication and suspect as falsified would not be sufficiently reliable under the Confrontation Clause. In *Stevens*, the admission of an autopsy report without the testimony of its author at trial was held to be prohibited under the Sixth Amendment because of a "substantial risk that the jury would infer improperly that the information contained in the document resulted from the coroner's independent evaluation of the evidence." *Id.* at 348. The document purported to be based upon an autopsy that revealed the identity of the body and the cause of death; but in reality, the information that the decedent was shot was given to the coroner by the sheriff, and no autopsy was performed to verify it.

> At petitioner's trial, the death certificate purported to be a statement by the absent coroner that an autopsy revealed the identity of the body, the cause

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Zirkin and his associates did not discharge their professional and official obligations under the statute. Their descriptive observations of the physical condition of decedent thus possess "particularized guaranties of trustworthiness" for all the reasons that attach to business and public records.

2. Category-Two Statements: Medical Opinions as to the Nature of Injuries or Illnesses including Medical Conclusions as to the Cause of Death Based upon These Opinions

Like their descriptive observations, we believe Dr. Zirkin's opinions and conclusions regarding the *medical*

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> of death, and the approximate date of death. At the evidentiary hearing, however, . . . [the coroner had] indicated that he did not perform an autopsy on the remains and found no evidence of bullets or metallic fragments from an x-ray of the remains. [He] further stated that he could not determine the identity of the body, the cause of death, the date of death, whether the death occurred as a result of homicide, or whether the death resulted from one or more gunshot wounds inflicted by an alleged assailant. Moreover, the coroner disclosed that he had discussed these facts with the prosecutor prior to trial.

Id. at 345-46 (footnote omitted).

The autopsy report in *Stevens* was not based on an autopsy of any kind, and it falsely created the impression that its contents reflected the coroner's independent medical conclusions based on such an autopsy. Such showings would clearly justify excluding this particular report from evidence for Confrontation Clause reasons.

cause of death are admissible: they reflect the pathologist's expert medical judgment, following an autopsy, as to the cause of death, a subject he was both professionally and by law charged with ascertaining and recording. Dr. Zirkin gave as the medical cause of death, "multiple injuries including mandibular and maxillary fractures, contusions and abrasions of the face, subgaleal hemorrhage resulted from the injuries although no cranial fractures, brain contusion, or subdural hemorrhage were seen." These conclusions followed upon Dr. Zirkin's detailed physical findings in respect to the nature and appearance of the observed injuries and related medical conditions. *See, e.g.*, n.13, *supra*.

Petitioner argues that Dr. Zirkin's conclusion that death was caused by the injuries is suspect as it was based not only on examination of the corpse, but upon certain hearsay evidence. Thus, Dr. Zirkin considered the results of the formalin fixed brain analysis performed by Dr. Mary Ambler. He also reviewed the report and photographs from the police department and the emergency room records of the Roger Williams General Hospital to which the decedent had been brought and where he died. We believe, however, that Dr. Zirkin's exposure to these extrinsic materials was appropriate and enhanced rather than undercut the trustworthiness of the autopsy report. In this regard, we distinguish between the pathologist's determination of the medical cause of death, i.e., "multiple injuries" as described, and his conclusion as to "manner of death," namely "homicide." The latter raises different issues which we shall discuss later.

Fed. R. Evid. 703 allows expert testimony to be based upon otherwise inadmissible evidence "[i]f of a type

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." Rule 703 reflects a recognition of the expert's integrity and specialized skill, which "will keep him from basing his opinion on questionable matter." J. Weinstein and M. Berger, Weinstein's Evidence ¶ 803(4)[01] at 803-146 (1990). *See also United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971) (en banc). Medical examiners are physicians, and physicians commonly base their opinions on tests and examinations performed by other physicians: for example, the reading of an x-ray by a radiologist. Thus, it was reasonable for Dr. Zirkin to consider the results of a brain analysis conducted by another physician as well as of laboratory tests and the like. Physicians also like to know how and when a patient was injured in order better to interpret the patient's observed condition. Thus, here Dr. Zirkin mentioned the police report of a beating at 1 a.m., of decedent's being found with shallow respirations and a weak pulse, and of his being taken by Rescue to Roger Williams General Hospital where he died at 1:47 a.m. This is the type of information a physician charged with Dr. Zirkin's responsibility would reasonably want to know, for whatever assistance it might provide in interpreting and verifying the results of the autopsy. The examiner would, of course, also want to see any hospital records pertaining to decedent's condition and treatment up to death. Such records are themselves independently admissible under the business records exception, a "firmly rooted" exception to the hearsay rule. *See* Fed. R. Evid. 803(6).

There is, moreover, a close analogy between the admission of medical records containing "diagnoses," as

specifically allowed under Fed. R. Evid. 803(6) and admission of the autopsy report in issue here. A determination of the cause of death following autopsy is, in effect, a medical diagnosis prepared by the pathologist pursuant to law for important societal purposes. Petitioner's objections to admission of the autopsy reports – that expert qualifications and accuracy of opinion cannot be adequately evaluated without cross-examination of the author of the opinion – are identical to those once made opposing the admission of medical records. Weinstein's Evidence, ¶803(6)[6] at 803-198 (1989). However, hospital records, including medical opinions, are now admitted under Rule 803(6), which expressly permits "opinions" and "diagnoses." We believe that hospital records containing statements of medical opinions constitute a "firmly rooted exception" to the hearsay rule, and thus would pass Confrontation Clause scrutiny.[17] The autopsy

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[17] Historically, admissibility of opinion in medical records posed a troublesome issue. Nevertheless, current practice, approved by McCormick, Wigmore, Weinstein and leading commentators, is to admit such evidence. Weinstein states:

> Rule 803(6) in accord with the trend of state decisions and the conclusion of leading legal authorities rejects any attempt to exclude a particular class of hospital records. Diagnoses and opinions, without restriction to routine vis-a-vis conjectural, or physical as against psychiatric, are included as proper subjects of admissible entries in addition to acts, events and conditions.

Weinstein's Evidence, ¶ 803(6)[6] at 803-200 (1989) (footnotes omitted). In *Phillips v. Neal*, 452 F.2d 337 (6th Cir. 1971), the court of appeals found that admission of psychiatric hospital

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report opinion as to cause of death was no more or less prone to error than medical opinions found in such hospital records. Medical opinions as to the nature of injuries or illnesses[18] and medical conclusions as to the cause of death, *see supra*; pp. 4-5, are based upon a common body of medical knowledge applied by physicians who possess relevant medical qualifications. Examiners lack any reason to falsify their reports and are motivated as professionals and public officials to reach their conclusions as conscientiously and accurately as possible. Rule 803(6), which was applicable in Rhode Island at the time in issue, authorizes a trial judge to exclude such records where indicia of reliability are lacking, and there may be situations where an autopsy report should be excluded because of indications of unreliability. *See Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984), discussed in note

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records opining the sanity of the defendant violated the Confrontation Clause. However, this case is distinguishable due to its emphasis on the conjectural nature of psychiatric diagnosis, the failure to even identify the authors of the psychiatric reports, and absence of any explication of the facts or reasoning process upon which the opinions and conclusions were based. *Phillips*, 452 F.2d at 347.

[18] There is a continuum between simple medical descriptions, as discussed under category one, and observations involving expert opinions. An example from the autopsy report in question of a medical opinion as to the nature of the injuries is as follows:

> The scalp and skull are opened in the usual manner. Subgaleal hemorrhage, measuring 3 inches in length is present in the frontal area and measuring 3 ½ by 2 inches in the left parietal area. No skull fractures are present. No subdural hemorrhage is seen.

16, *supra*. In this case, the trial court, after conducting a voir dire inquiry as to reliability, found specifically that the report was reliable. We believe, in these circumstances, that the report possesses at least the same indicia of reliability as do commonly admitted hospital records.

As with diagnoses reflected in medical records, adequate means were available to the defendant to bring to the jury's attention any error or flawed conclusions in the medical examiner's opinions. The bases of Dr. Zirkin's judgments are described in the report in detail. The defendant could have had his own medical experts review the report and give a different opinion as to the cause of death. In fact, defendant tendered no experts to support his claim that death may have been due to drug-induced or spontaneous hemorrhage rather than the observed injuries.[19]

The actual preparer of the report was not necessarily any better suited than another equally trained medical examiner familiar with the procedures and medical implications to answer questions as to the medical opinions presented in the report. Petitioner argues that his attempts to cross-examine Dr. Burns as to these very issues were rebuffed by the trial judge in response to the prosecutor's objections. But petitioner's interests were adequately protected by the option, which the judge extended to him, to call Dr. Burns or an outside expert of his own choosing, as witnesses in his case. By these means, defendant could have pressed his argument that

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[19] The autopsy report noted cocaine metabolite in the urine, and THC (marijuana) in the blood, although it did not mention these substances as possible causes of death.

death was caused not by the injuries received from the beating but from decedent's use of drugs.

The Supreme Court suggested in *Inadi* that the defendant is further protected from prejudicial hearsay when the defense may subpoena an available declarant:

> [I]f the defense has not chosen to subpoena such a declarant, either as a witness favorable to the defense, or as a hostile witness, . . . then it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant "available."

Inadi, 475 U.S. at 398. Reasoning that imposing a burden on the prosecution to call all such witnesses or demonstrate unavailability was unjustifiable, the Court noted that the defendant's option to call the declarant under the Compulsory Process Clause rendered the benefit of an unavailability rule under the Confrontation Clause slight. Here if the preparer of the autopsy report, Dr. Zirkin, were indeed available, as the district court believed, the defendant could have called him as his own witness or deposed him in Israel or before he departed.[20]

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[20] With respect to medical records, Weinstein notes that

> the adversary "may himself call the declarant and thus bring out, if he can, any weaknesses of the diagnosis." [McCormick, *Evidence* § 290 at 613 (1954)]. In addition, failure to call the doctor may permit an opponent a field day in showing "shortcomings" in the procedures used which might have been readily explained the doctor who prepared the report was present; there is a self-limiting feature that minimizes abuse.

Weinstein's Evidence ¶803(6)[06], at 803-198 – 803-199 (1990).

We conclude that the examiner's opinion that death was caused by the multiple injuries and subsidiary medical opinions in the report were properly admitted.

3. Category-Three Statements: Statements as to Circumstances Surrounding the Death Taken from Police Reports or Other Sources

When the autopsy report went to the jury it contained the statement, that decedent was beaten by assailants in a parking lot on Mineral Spring Avenue, on November 2, 1980, at approximately 1 a.m. *See supra*, pp. 4-5. Dr. Zirkin presumably took this from the police report. In this regard, the district court said:

> In this case, the portion of Dr. Zirkin's report relating to the fight in the parking lot cannot be considered medical opinion. It is a factual conclusion. The report could be and apparently was read by the jury as concluding that the decedent died as a result of the beating in the parking lot, rather than as a result of the subarachnoid hemorrhage. In his grand jury testimony Dr. Zirkin testified that the subarachnoid hemorrhage, swelling and bleeding in the tissue lining the brain, caused the death.

Manocchio v. Moran, 708 F. Supp. 473, 478 (D.R.I. 1989) at 478. The district court found that the inclusion in the report of the factual conclusions as to the circumstances surrounding the death (as well as the opinion as to manner of death, *see infra*) was fatal to its admissibility.

The district court's criticism would have force if the autopsy report's reference to the beating at the parking lot added materially to the state's case against defendant

– as, for example, had the police report identified defendant as one of decedent's assailants or constituted important evidence that a beating had occurred. While the medical examiner was entitled to take into account, for purposes of formulating an overall picture of decedent's medical condition, the police's information that decedent had been beaten shortly before he died, this was inadmissible at trial to prove the state's case against the defendant. Had defendant objected specifically to the report's reference to the parking lot beating, the trial court should have redacted the material, just as it would redact from a medical record any prejudiced hearsay concerning the particulars of a motor vehicle accident that were relayed to the doctor.

The fact that the decedent was beaten by assailants in the parking lot, however, was never seriously contested, nor has it been brought to our attention that the defense ever asked the court to redact the particular portion of the autopsy report referring to a beating. The beating of decedent in the parking lot was testified to at trial by a prosecution eye witness, Jayne Leo. The occurrence of a beating was further supported by the testimony of several other state witnesses, who, while they did not witness the beating, had rushed outside afterwards and ministered to the victim who they found bleeding, injured and dishevelled, lying on the ground in the parking lot, in a state that virtually compelled the conclusion that he had been assaulted and beaten. The "circumstances surrounding the death" portion of the autopsy report did not mention petitioner's name nor did it state implicitly or explicitly that petitioner was in any way involved in the beating. It stated merely that decedent

was beaten by assailants at a certain time and place, that he was found with shallow respirations and a weak pulse, and that he was taken to a hospital where he died less than an hour after the beating. Petitioner did not challenge the truth of any of these assertions; he challenged only the state's assertion that the injuries resulting from the beating caused the victim's death, suggesting, instead, that a hemorrhage induced by drug ingestion, or possibly a *spontaneous* hemorrhage, caused death.

In these circumstances, the district court's implication that the autopsy report's reference to the beating misled the jury into believing that the beating, "rather than . . . the subarachnoid hemorrhage," caused decedent's death is puzzling: the autopsy report did not reject the subarachnoid hemorrhage as contributing to the death but rather attributed the hemorrhage to the "multiple injuries." As noted, there was independent and uncontroverted evidence that a beating had occurred. Whether death resulted from the injuries, or from drug use, was strictly a medical question, which reference to the beating did not affect. We thus see no prejudice in the sentence about the beating.

Defendant, indeed, makes no argument that this portion of the report was detrimental to his case because it revealed a beating or linked him to the beating in some manner not fully accomplished by the remainder of the evidence. We conclude, beyond a reasonable doubt, that admission, without redaction, of the portion of the autopsy report repeating this information obtained from the police report was not prejudicial. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Chapman v. California*, 386 U.S. 18, 24 (1967). Cross-examination of Dr. Zirkin on the

particulars of this information, as to which Dr. Zirkin was without personal knowledge, would, moreover, have offered no benefit to the defendant.

E. Category-Four Statements: The Medical Examiner's Final Conclusion as to "Manner of Death," *viz.*, "Homicide"

The autopsy report concluded with the statement: "Manner of Death: Homicide." Homicide is the killing of a human being. Black's Law Dictionary (4th ed. 1968). Homicide may be justifiable, as when done in self defense, or non-justifiable, as when murder or manslaughter. The autopsy homicide conclusion, therefore, implies two things: *First*, human action, i.e., the beating, injured the victim; and *second*, the victim died as a result of these injuries. We discussed the latter component under category two, above, and concluded that the medical examiner's opinion that decedent died as a result of multiple injuries described in the report did not violate the Confrontation Clause. We are left, then, to decide whether the admission of the report's statement – implicit in the homicide conclusion – that the beating caused the victim's fatal injuries[21] was constitutional error.

In a different case, this question might be a difficult one. If, for example, decedent had fallen from a window,

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[21] The autopsy conclusion, read in its entirety, implies that the fatal injuries resulted from the beating at issue here. The "homicide" conclusion, logically, only means that his injuries resulted from some human force, possibly including an earlier beating. Nevertheless, in light of the reference to a specific beating in the report, the inescapable force of Dr. Zirkin's conclusion is that the victim died as a result of that beating.

and the question was whether he was pushed out or had fallen accidentally, a medical examiner's finding of "homicide" would likely be inadmissible. Such a finding could be highly prejudicial, since it would contradict defendant's claim of accident, and would almost certainly have to be based on a police report or similar extrinsic evidence. At very least, the medical examiner's presence might be needed for cross-examination on whether the finding of "homicide" rested on medical factors rather than police report hearsay.

Here, however, there is no such difficulty. There is no dispute that decedent was beaten. Defendant's theory is not that decedent's multiple injuries were caused by some accidental cause, such as a fall, but rather that the multiple injuries the victim sustained were not the true cause of his death. Instead, defendant speculates – although without offering any expert evidence in support – that the victim died as a result of drug ingestion or, possibly, a spontaneous hemorrhage. This is a purely medical argument, and, as we have held, medical opinions as to cause of death may be constitutionally presented in an autopsy report just as they may be presented in a hospital record. Defendant could refute the examiner's opinion as to cause of death by presenting the opinions of his own experts.

Thus in the circumstances of this case, we see no Confrontation Clause problem in permitting the medical examiner's finding of "homicide" to reach the jury. The finding simply reflected the examiner's opinion that

injuries received in an unquestioned beating – rather than some other medical cause – had caused death.[22]

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[22] Dr. Zirkin's testimony before the grand jury suggests that while the prime focus in reaching his conclusion of homicide were his observations as to the state of the corpse at the autopsy, he took into account the reported beating, finding this consistent with these observations. Excerpts from that testimony are as follows.

A: The internal examination revealed hemorrhage within the scalp as well as cerebral edema and sub-arachnoid hemorrhage. In other words, there were swelling of the brain and hemorrhage within the lining, the tissue lining the brain called the arachnoid. This was a result of blows to the heal, [sic] although there was no fractures of the skull itself, the cranial vault in which the brain sits.

Q: If you get blows to the head, it damages the brain, the brain swells?

A: Yes, sir, that is correct.

Q: And you found that from your autopsy?

A: That is correct.

Q: From a medical standpoint would indicate to you that he had received some trauma, some force – the bone not bring [sic] broken, what sort of an object would do this to him?

A: Any blunt instrument could do this or perhaps a fall on the pavement could explain that.

Q: All right, a blunt instrument, all right. Could it be fists?

A: Yes, sir, it could be.

Q: A board, a stick?

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While, therefore, we question the admissibility of an autopsy report's conclusion that a fatal injury was due to

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A: Yes, sir, it could be those.

. . .

Q: All right, what injuries which you found would be termed fatal?

A: The fatal injuries were perhaps more the result of the beating on the head and that includes the cerebral edema and the sub-arachnoid hemorrhage.

Q: All right, and after concluding your external and internal examination coupled with medical certainty and your experience did you come and give the cause of death and also the manner?

A: Yes, sir, the cause of death was multiple injuries and the manner of death was homicide.

Q: All right, now the cause of death, would it be directed also to the cranium and the brain and you talked about blood, what was it that actually killed him?

A: The death was actually caused by the sub-arachnoid hemorrhage, in other words, hemorrhage in the tissue which lines the brain.

. . .

Q: How about the feet, could he have been kicked to death?

A: It is possible that he could have been kicked and the kicking could have caused injuries severe enough.

. . .

Q: Did you get a history on this case?

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"homicide," we believe that its admission here was, at worst, harmless error beyond a reasonable doubt.

CONCLUSION

The admission of this autopsy report in the absence of testimony by its preparer did not violate the Confrontation Clause – even though autopsy reports are not a firmly rooted hearsay exception. The contribution of the present report to the state's case lay in presenting the medical examiner's findings and conclusions, following autopsy, as to the medical cause of death. A report covering such matters possesses sufficient particularized guarantees of trustworthiness to be received in evidence regardless of the absence of the medical examiner who wrote it and performed the autopsy.

In so holding, we caution that when autopsy reports are allowed into evidence, care must be taken to redact

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A: Yes, sir, I did . . . the history that I have is that the decedent was beaten by assailants in a parking lot on Mineral Spring Avenue in North Providence on November 2nd, 1980, at approximately 1:00 a.m. He was found with shallow respirations and a weak pulse. He was taken by the rescue squad to Roger Williams General Hospital where he died at 1:47 a.m. on November 2nd, 1980.

. . .

Q: And what you've told us about the examinations of your autopsy, is that consistent with what the history says caused the . . . ? (Last word inaudible to transcriber)

A: Yes, sir, that is entirely consistent.

information therein going beyond medical data and evaluation that may violate the constitutional rights of the accused. In the present case, the information as to a beating and the examiner's conclusion of "homicide" were of questionable admissibility. However, for reasons stated, redaction was unnecessary or, at least, the failure to redact was harmless beyond a reasonable doubt.

The decision of the district court granting a writ of habeas corpus under 28 U.S.C. § 2254(d)(2) is reversed. The case is remanded to the district court with directions that the petition for a writ of habeas corpus be denied.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1310

NICHOLAS P. MANOCCHIO,

Petitioner, Appellee,

v.

JOHN MORAN, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Respondent, Appellant.

Before

Breyer, *Chief Judge*,
Brown,* *Senior Circuit Judge*,
Campbell, Torruella, Selya and Cyr, *Circuit Judges*.

ORDER OF COURT

Entered, November 14, 1990

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*The Honorable John R. Brown, Senior Circuit Judge, of the Fifth Circuit, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By DANIEL F. LOUGHRY
Chief Deputy Clerk.